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In the Supreme Court of the United States

October Term, 1954

No. [redacted] 57

BRIDAL VEIL LUMBER COMPANY,
Petitioner.

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIDAL VEIL LUMBER COMPANY,
Petitioner.

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered January 3, 1955, and confirmed upon rehearing March 8, 1955, reversing the judgment of the District Court of the United States for the District of Oregon rendered April 14, 1953.

OPINIONS BELOW

The Oral Opinion of the District Court, given March 24, 1952, is set forth in Appendix A of this petition.

The Opinion of the Court of Appeals, dated January 3, 1955 is not yet reported, and is appended hereto as Appendix B. The Opinion of the Court of Appeals on the Petition for Rehearing, dated March 8, 1955, is not yet reported and is set forth in Appendix C.

BASIS OF JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit were filed January 3, 1955; petition for rehearing was timely filed by petitioner, and an Opinion and Order denying the petition for rehearing were filed March 8, 1955.

Application for stay of mandate pending the application for writ of certiorari in this Court was made March 9, 1955, and an order staying the mandate of the Court of Appeals for the Ninth Circuit until April 7, 1955, pending the application for writ of certiorari in this Court was entered March 9, 1955. Application for extension of stay of mandate was made April 1, 1955, and an order extending the stay of mandate until May 2, 1955, was entered April 1, 1955.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

Respondent railroad, (herinafter called "railroad") brought this action against petitioner industry (hereinafter called "industry") seeking indemnity under a spur track agreement for damages it was required to pay one of its employees for personal injuries. Each party charged the other with negligence in several particulars. Special findings on each specification of negligence alleged were submitted to the jury, but the trial court, at railroad's request, charged them that they did not have to make findings on any specification of negligence about which they could not agree. Railroad did not object to such charge. The jury returned its findings that railroad was negligent in six particulars as charged, and that railroad negligently caused or directly contributed to the accident. The jury further found that industry was not negligent in six of the seven particulars alleged, and left unanswered one such question. The Court of Appeals reversed on the sole ground that no finding was made on this issue, and ordered a new trial of all issues.

1. Does Rule 51 of the Federal Rules of Civil Procedure preclude railroad from assigning as error the failure of the jury to find on one issue, because it failed to object to the instruction which procured it?

Petitioner contends that the decision of the Court

of Appeals in permitting this assignment of error to be raised creates a conflict among the circuits on an important question of federal law.

2. The trial court entered judgment in favor of industry on the verdict of the jury, and found that industry was not negligent. Did the Court of Appeals err in holding:

a. That the trial court could not reconcile the answers of the jury on the other issues with the failure to answer the particular issue?

b. That the finding of the jury that railroad's negligence was the cause of the accident and the refusal of the jury to find that any negligence of industry caused the accident did not amount to a general verdict against railroad?

c. That the failure to make a finding was not a finding against respondent who had the burden of proving that issue?

d. That if a new trial was required, the issues upon which the jury was able to reach an agreement must also be retried?

Petitioner contends that the combination of the foregoing holdings amounts to a destruction of the functions and purposes of the special verdict as provided by Rule 49(a) of the Federal Rules of Civil Procedure

by relegating it to its status under common law as a procedural trap. When considered all together, the net effect on the workability of the special verdict is so serious as to present an important question of federal procedure which should be settled by the Supreme Court.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

No statutory or constitutional provisions are involved in the instant case. The following provisions of the Federal Rules of Civil Procedure are involved:

Rule 49 (a)

"SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand

the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accordance with the judgment on the special verdict."

Rule 51

"INSTRUCTIONS TO JURY: Objection. ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

STATEMENT OF THE CASE

Railroad served industry by a spur track. (R., 10). On March 14, 1946, a railroad employee was injured in a collision between a railroad car on which he was working and a lumber carrier (known as a "hyster") operated by industry. (R., 12). Subsequently, the employe brought an action against railroad under the Federal Employers' Liability Act and recovered a judgment for $20,000 plus costs, which was eventually satisfied by railroad on June 15, 1948, by the payment of $21,850. The railroad, upon being sued, had tendered the defense of the action to industry which denied liability. (R., 12-13).

The Proceedings in the District Court

On March 23, 1949, railroad instituted this action against petitioner in the United States District Court

for the District of Oregon. Jurisdiction was based upon diversity of citizenship. Plaintiff is a Utah corporation, defendant is a Delaware corporation doing business in Oregon, and the amount in controversy exceeds three thousand dollars, to-wit, $21,850. (R., 9).

The railroad alleged that the injury to its employee was caused by the negligence of industry, and asserted that it was entitled to be indemnified either for all or half the amount paid by it (R., 14-17) under the provisions of a contract between the parties which provided that if either party was solely or primarily responsible for the accident, it would bear the entire cost, and if both were jointly negligent, each would bear one-half thereof, (R., 148). This interpretation of the contract was adopted by both the District Court (R., 131, Appendix A, p. 24) and the Court of Appeals, (R., 164-166, Appendix B, p. 39) and is not in issue herein.

The issues thus made by the pleadings and the pretrial order were tried before the Honorable Gus J. Solomon, District Judge, and a jury, and at the instance of railroad, (R., 116) were submitted to the jury in the form of a special verdict under Rule 49(a). The verdict required the jury to answer 18 questions, seven inquiring whether industry was negligent in each of the particulars charged by the railroad, nine inquiring whether railroad was negligent in each of the particu-

lars charged by the industry, and the other two inquiring whether any negligence of either was the cause of the accident. (R., 31-33, Appendix D).

In the course of his charge to the jury, the court advised them that they must answer all the questions submitted to them. (R., 95-96). To this, railroad objected, stating that if the jury answered any question regarding negligence of a particular party in the affirmative, there was no necessity for them to answer any of the other questions regarding negligence of that party. (R., 116, 124). The court then further instructed the jury that if they could not agree upon any of the questions either in the affirmative or the negative, they need not answer such questions. (R., 125-126). To this, railroad made no objection.

The jury returned its verdict which found railroad negligent in six particulars, and that its negligence caused or directly contributed to the accident. They found industry not negligent in six of the seven particulars, but were unable to agree upon an answer to the question whether industry failed to keep a proper lookout. Having found no negligence of industry, the jury made no answer to the question whether its negligence contributed to the accident. (R., 31-33; the verdict of the jury is set forth in full in Appendix D.)

The District Judge, after motions for mistrial, (R.,

33) and for a judgment notwithstanding the verdict or a new trial (R., 36) entered judgment in favor of industry on April 14, 1953 (R., 71) making a conclusion of law (R., 70) that:

> "The sole proximate cause of the injuries to 'railroad company's' employee and 'railroad company's' loss arising therefrom was the result of 'railroad company's' own negligence and did not result through any negligence on the part of the defendant. This conclusion is according to the verdict of the jury on the negligent issues as received and entered herein."

The Decision of the Court of Appeals

Railroad prosecuted an appeal to the Court of Appeals for the Ninth Circuit, which found the trial below free of reversible error (R., 156-167, Appendix B) except that "the disagreement of the jury on one vital issue left a gaping hole in the special verdict." (R., 164, Appendix B, p. 38). Accordingly it reversed the judgment of the District Court and remanded the case for a new trial on all issues. (R. 167, Appendix B, p. 42). Industry filed a petition for rehearing, which was denied. (R., 169, Appendix C).

ARGUMENT

Question 1.

There are numerous decisions of the Courts of Appeal upholding the doctrine of Rule 51 that the giving of

an instruction cannot be assigned as error for the first time on appeal unless the instruction was specifically objected to, and the trial court given an opportunity to correct his error. See, e.g., **Bolan v. Lehigh Valley R. Co.,** 167 F. 2nd 934, 937 (C.C.A. 2, 1948); **Biggins v. Hajoca Corp.,** 185 F. 2d 982, 986 (C.A. 3, 1950); **New York Life Ins. Co., v. Schlatter,** 203 F. 2d 184, 188 (C.A. 5, 1953); **Hoag v. City of Detroit,** 185 F. 2d 764, 766 (C.A. 6, 1950); **Steuber v. Admiral Corp.,** 171 F. 2d 777, 780 (C.A. 7, 1949); **Louisville & Nashville R. Co., v. Botts,** 173 F. 2d 164, 169 (C.A. 8, 1949); **Grand River Dam Authority v. Thompson,** 118 F. 2d 242, 245 (C.C.A. 10, 1941). The present decision holds that the verdict is insufficient, but ignores the fact that it was the instruction of the court which permitted the jury to omit the finding on any issue on which they could not agree. Neither upon the original hearing nor upon rehearing did the Court of Appeals consider industry's argument under Rule 51. By permitting railroad to attack the instruction under the guise of attacking the verdict which was the natural result of it, the Court of Appeals circumvents the requirements of Rule 51 and sets up a conflict between its ruling and the holdings in the other circuits that an instruction not properly objected to will not be considered upon appeal. The Courts should be bound by this rule as well as the parties and failure to enforce it in this case makes a mockery of the rule.

Moreover, the instant decision is in direct conflict with the holding of the Court of Appeals for the Fifth Circuit in **Garland v. Lane-Wells Co.,** 185 F. 2d 857 (C.A. 5, 1950) on the precise question here involved. In that case, the jury by special findings found plaintiff-appellant's injuries to have been the result of unavoidable accident and did not answer the issues submitted to them on negligence and contributory negligence. Appellant insisted that despite the finding of unavoidable accident, he was entitled to findings on the negligence issues and his appeal took the form of an objection to the verdict. The Court of Appeals refused to consider the objection to the alleged insufficient verdict because of the failure of appellant to object to the instruction of the District Court which told the jury that if they found the injuries to have been the result of unavoidable accident, they should not make findings on the other issues.

Similarly, in this case, the court advised the jury if they could not agree on any issue, that, rather than attempting to resolve their differences, they should omit that issue. Railroad failed to object to that instruction. It is precluded by Rule 51 from raising the insufficiency of the verdict.

The requirement of Rule 51 is the most basic precept of appellate jurisdiction; that the appellate court will

not consider error which was not brought to the attention of the trial court. The present decision involves a serious inroad upon that principle in that it appears to hold that an erroneous verdict can be assigned as error upon appeal, even though it is the direct and natural result of an instruction to which no objection was made. The Fifth Circuit has held to the contrary, and the conflict of opinion upon this important issue should be resolved by this Court.

Question 2.

Although this question appears to involve several distinct problems, petitioner believes that, considered together, they all present different aspects of the same important question of federal procedure — Is the special verdict to be the workable instrument of justice which the authors of Rule 49(a) intended, or is it to fall back into its common law status as a procedure involving so many hazards as to be utterly worthless? In petitioner's opinion, the instant decision is a throwback to the vices of the special verdict under common law and lessens the utility of the special verdict to a point at which will be virtually useless in the Ninth Circuit, and that this impairment of the functions of an important rule of federal procedure presents an important question of federal law which this Court should settle.

Rule 49(a), as stated in the Commentaries on the Rule in Title 28, U.S.C.A., Federal Rules of Civil Procedure, Rules 17 to 51, p. 483, is designed to eliminate the procedural technicalities surrounding the special verdict at common law, which made its use extremely hazardous. The desirability of special verdicts, and the intention of Rule 49 to facilitate their use has been frequently commented upon. (See, e.g., **Pacific Greyhound Lines v. Zane,** 160 F. 2d 731, 737 (C.C.A. 9, 1947); **Skidmore v. Baltimore & O. R. Co.,** 167 F. 2d 54, 70 (C.C.A. 2, 1948); **Cate v. Good Bros.,** 181 F. 2d 146, 148 (C.A. 3, 1950). The present decision, however, fails to interpret the Rule in such a way as to encourage the special verdict, and in fact, overrides the laudable attempt of the trial court liberally to interpret the Rule to accomplish its purposes.

The jury found that industry was not negligent either in failing to keep the hyster under control, or in failing to apply the hyster brakes properly, or in permitting the hyster to come down the ramp and collide with the railroad car, or in turning the hyster so as to collide with the railroad car. It failed to agree on whether or not industry was negligent in failing to keep a proper lookout. (R., 31-33, Appendix D). The trial judge entered judgment in favor of industry and made a finding that industry was not negligent. (R., 70-71). In effect, this represents his considered conclusion that

if industry was not negligent in the respects indicated, it could not have failed to keep a lookout under the evidence presented. The Court of Appeals, without any transcript of testimony before it, presumes to substitute its judgment for that of the trial judge, and holds that "lookout" was a different issue from the others, on the ground that the trial judge submitted it as a different issue, and that the jury apparently considered it to be different. (R., 164, Appendix B, p. 38).

Even assuming that the trial court's submission of "lookout" as a separate issue indicated that he then considered it as such, his entry of judgment and his finding that industry was not negligent represent his conclusion upon mature consideration that it was not a distinct issue. He may have been wrong in this respect, but it is difficult to understand how the Court of Appeals can so conclude in the absence of the testimony.

The record demonstrates, however, that in submitting the special verdict, the court did not attempt to define the issues himself, but merely incorporated into the verdict the various specifications of negligence with which each of the parties charged each other in the pre-trial order. (R., 15-16, 19-20). Merely because a party alleges repetitious and overlapping specifications of negligence, it is not incumbent upon the court to hold that they are necessarily different, or that a

negative answer to one does not preclude an affirmative answer to another.

The fact that the jury may have considered them different does not mean that the trial court was in error in his finding, which in effect withdrew from their consideration the issue on which they did not make a finding. Again, this may have been error, but the Court of Appeals cannot so find without having the evidence before it.

"Reconciliation of the jury's various responses should be sought, and accepted wherever possible, to achieve a harmonious result," **Morris v. Pennsylvania R. Co.,** 187 F. 2d 837 (C.A. 2, 1951). The Court of Appeals should not upset the trial court's attempt to follow this liberal rule of interpretation, without better reason than here appears.

The trial court's decision can be explained on another ground. The jury found that railroad was negligent, and answered "yes" to the question:

> "If you find that plaintiff, Union Pacific Railroad Company, was negligent in any of the respects mentioned in Section III, did such negligence cause or directly contribute to, the accident and the resultant injury to Daniel W. Fagan?"

It furthermore refused to make a similar finding

with respect to industry. This decision amounted to a general verdict against railroad, and the trial court was justified in accepting it as such despite the failure of the jury to answer one of the special issues. For all that the Court of Appeals knew, there may have been no evidence whatsoever to justify the submission of the issue of "lookout." Industry so argued at the time of the submission of the verdict. (R., 120). The fact that the trial court submitted it, in the absence of the record, should not be permitted to override the fact that he later saw fit to enter judgment and make a finding of no negligence.

Once again, the purposes of Rule 49(a) to avoid the procedural pitfalls of the common-law special verdict, and the attempt of the trial judge to rule in accordance with those purposes have been circumvented by the decision herein.

Furthermore, the inability of the jury to agree on the issue of "lookout" amounts to a finding that railroad failed to carry the burden of proving that issue. **Daube v. Philadelphia & R. Coal Co.,** 77 Fed. 713, 715 (C.C.A. 7, 1897); **United States v. Harris,** 77 Fed. 821 (C.C.A. 7, 1897); **Schioler v. Secretary of State,** 175 F. 2d 402, 403 (C.A. 7, 1949). This rule too, accords with the purposes of Rule 49(a) to prevent procedural

hazards from destroying verdicts which should set an end to the case.

Finally, industry contends that the Court of Appeals in remanding this case for a new trial upon all issues, instead of just the issues relating to industry's negligence, demonstrates its misconception of the nature and purposes of special verdicts. As stated by Professor Sunderland in what Judge Jerome N. Frank has called a "brilliant article," (**Morris v. Pennsylvania R. Co.,** 187 F. 2d 837, 843 (C.A. 2, 1951):

> "The general verdict is either all wrong or all right, because it is an inseparable and inscrutable unit. A single error completely destroys it. But the special verdict enables errors to be localized so that the sound portions of the verdict may be saved and only the unsound portions be subject to redetermination through a new trial."
>
> "Verdicts, General and Special,"
> 29 Yale L.J. 253, 259 (1920).

Judge Charles E. Clark, not an enthusiastic supporter of special verdicts, has described this function of preserving portions of the verdict as the "purpose and best achievement" of this procedural device. **Morris v. Pennsylvania R. Co.,** supra, at p. 841.

If a retrial must be held, the only purpose of retrying the issue of railroad's negligence will be to permit the second jury to **decide** both sides of the question,

not merely to **look** at both sides, as the Court of Appeals states. (R. 171, Appendix C, p. 44). If the jury is to consider the entire situation, apply its conception of what the law ought to be and return what is in its opinion a "just" verdict, "inseparable and inscrutable," as it does with a general verdict, this is a reasonable objective. But as Judge Frank points out, the special verdict is designed precisely for the purpose of limiting such "juriesprudence," (See **Skidmore v. Baltimore & O. R. Co.,** 167 F. 2d 54, 59 (C.C.A. 2, 1948) by confining the jury to fact-finding, and leaving the application of the law to the facts to the judge, who is presumably better qualified for the task. Whether or not one agrees with this objective, there can be no question but that Rule 49(a) was designed to accomplish it.

The only basis for choice of the second verdict over the first is that the first jury was unable to agree on a different issue. Petitioner submits that if the sole purpose of the jury is to find the facts, this does not constitute a reason for rejecting a unanimous finding, after a trial free of error, that railroad's negligence contributed to the accident. If this were the ordinary case of contributory negligence, rather than one of indemnity, such a finding would be conclusive, irrespective of the failure of the jury to find on other issues. The facts are the same; only the legal rules differ. If

the jury is to find facts, why should its finding not be equally good in both cases?

In petitioner's opinion, the only relevant factor in choosing between the two verdicts is the relative accuracy of their fact-finding. Which is more likely to be accurate, a jury which heard the facts of a 1946 acident in 1950, or one which will hear the witnesses' versions in 1955, or possibly 1956? The question answers itself.

Suppose that the second jury should unanimously agree that industry was or was not negligent, but that they are unable to agree concerning the negligence of respondent. Is the case to be retried in toto a third time, in 1958, despite the fact that all issues will have been determned? The prevention of just such incongruities is, in Judge Clark's phrase, the "purpose and best achievement" of the special verdict. The instant decision is important not only in appellate courts, but to nisi prius jurisdiction in the consideration of motions for new trals. If permitted to stand, it will lead to continual relitigation of already decided issues.

Taken all together, petitioner submits that the effect of the decision of the Court of Appeals is so serious a departure from the intentions of the authors of Rule 49(a) as to impair its functioning in the Ninth Circuit The Rule, as previously mentioned, is an attempt to

encourage a certain type of procedure. If the instant decision is permitted to stand, its effect will be to discourage that procedure to the point where it will be discarded. The emasculation in this manner of an important provision of the Federal Rules of Civil Procedure presents an important question of federal law which this Court should determine.

Respectfully submitted,

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